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IN THE

Supreme Court of the United States.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

[Record No. 18,542.]

BRIEF FOR PLAINTIFF IN ERROR.

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JOHN G. JOHNSON,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, Defendants in Error.

October Term, 1903.

No. 56.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Hughes & Fleming, the defendants in error, brought suit in the Court of Common Pleas, No. 2, of Philadelphia County, for injuries to a horse shipped from Albany, N. Y., to Cynwyd, in the State of Pennsylvania, under a through bill of lading (Record, page 47) issued by the New York Central and Hudson River Railroad Company, a common carrier of the State of New York, at Albany, on the tenth day of August, 1900. This bill of lading expressed that the shipper had delivered to the carrier one horse, the consignee being one Thomas Grady, of Cynwyd, Pa., for transportation to destination, "if on the said carrier's line of "railroad, otherwise to the place where said live stock is

"to be received by the connecting carriers for transpor-"tation to or toward destination, and that the same has "been received by said carrier for itself and on behalf of "connecting carriers, for transportation, subject to the "official tariffs, classifications and rules of the said com-"pany," and upon certain terms and conditions therein enumerated. The bill of lading named a through rate of fare and provided:—

> "Thomas Grady does hereby acknowledge that "he had the option of shipping the above-described "live stock at a higher rate of freight according to "the official tariffs, classifications and rules of the "said carrier and connecting carriers, and thereby "receiving the security of the liability of the said "carrier and connecting railroad and transportation "companies, as common carriers of the said live "stock, upon their respective roads and lines, but "has voluntarily decided to ship the same under "this contract at the reduced rate of freight above "first mentioned."

The agreement further provided:—

> "No carrier shall be liable for loss or damage not "occurring on its own road or its portion of the "through route, nor after said property is ready "for delivery to the next carrier or to consignee. "The amount of any loss or damage for which any "carrier becomes liable shall be computed at the "value of the property at the place and time of "shipment under this bill of lading, unless a lower "value has been agreed upon or is determined by "the classification upon which the rate is based, in "either of which events such lower value shall be the "maximum price to govern such computation."

It contained this further provision:—

> "That said shipper or the consignee is to pay "freight thereon to the said carrier at the rate of "_____ per _____ which is the lower "published tariff rate upon the express condition

"that the carrier assumes liability on the said live "stock to the extent only of the following agreed "valuation, upon which valuation is based the rate "charged for the transportation of the said animals, "and beyond which valuation neither the said car- "rier nor any connecting carrier shall be liable in "any event, whether the loss or damage occur "through the negligence of the said carrier or con- "necting carriers, or their employees or otherwise.

"If horses or mules—not exceeding one hundred "dollars each."

It was alleged that the horse thus carried at a low rate upon an agreed valuation of $100, was injured in the course of the transit in Pennsylvania, after it had arrived in that State and had been delivered to the plaintiff in error by the connecting carrier.

An action was brought against it to recover for the injuries thus occasioned. It was contended on the trial that the horse was possessed of enormous value because of occult fast virtues. It was impossible to present testimony in contradiction. A verdict of $9000 was rendered.

The learned trial judge negatived points to the effect that (1) the contract being valid in the State of New York was enforceable in Pennsylvania, inasmuch as the contract provided for a through transportation; and (2) that the plaintiff had no legal right to recover in excess of $100; and he charged, *inter alia*, as follows (Record, page 59):—

"I charge you that according to the law of Penn- "sylvania such a contract could not be made by a "Pennsylvania corporation in the State of Penn- "sylvania for carriage over a railroad of the State "of Pennsylvania. The true question here is not "whether citizens have a right to contract, because "as a general rule the right of contract is sacred. "There are, however, limitations upon the right of "contract. There is a certain field of human ac- "tivity over which the State assumes supreme con- "trol by virtue of its sovereignity, and when the "State declares its policy, which we call public policy,

"upon those questions, then the right of private "contract is utterly abolished to that extent. Ac- "cording to the policy of the State of Pennsylvania "no one who operates a railroad on its public roads "can in any way, directly or indirectly, protect "himself against his own negligence, and this upon "the theory that the rights of the State of Pennsyl- "vania over its own roads are absolutely sovereign. "If the proposition be correct that the State of "Pennsylvania by virtue of its sovereignty refuses "to permit a carrier on its public roads to excuse "himself, or limit himself, or protect himself against "his own negligence by contracts made in the State "of Pennsylvania, it is perfectly obvious that it will "still less permit people outside of the State to make "contracts by which the sovereignty of the State "of Pennsylvania shall be interfered with. That "which may not be done by the roads of the State "of Pennsylvania cannot be done by any device. "No man may go away from here and agree to vio- "late the public policy of Pennsylvania, and no man "who has never been here may outside of the State "contract to violate the public policy of Pennsyl- "vania within the State. Therefore so far as these "papers constitute a contract by anybody at any "time or any place made and entered into contem- "plating a violation of the public policy of Pennsyl- "vania upon its own highways, such contract is "absolutely null and void to that effect. I there- "fore charge you that there is no limitation of one "hundred dollars upon the amount that you shall "ascertain as damages."

An appeal was taken to the Supreme Court of the State and error was assigned to the learned trial judge's refusal of the points submitted to him. An additional assignment was made claiming that judgment had been entered in conflict with the Interstate Commerce Act. (Record, page 62.)

The appeal was dismissed. The learned justice who delivered the opinion of the appellate court said, *inter alia* (Record, page 66):—

"Where a contract containing a stipulation limiting liability for negligence is made in one State, "but with a view to its performance by transportation through or into one or more other States, "we see no reason why it should not be construed "in accordance with the law of the State, where its "negligent breach causing injury, occurs. If such "a contract comes under construction, in a State "like Pennsylvania whose policy prohibits such "exemption, and the injury has occurred in a State "where the contract is valid, the stipulation will be "enforced. But if the injury has taken place within "its limits, it will declare the contract null and void."

He further said:—

"The third assignment of error suggests that the "entry of judgment is in conflict with the interstate "commerce act of Congress. This seems to be an "afterthought, as there is no indication in the record "that this question was raised or considered in the "court below. It is not apparent how the act can "have any application to this case. It contains "nothing bearing upon the validity of a contract "limiting the liability of a railroad for loss or injury "caused by negligence. The object of the act seems "to me to be to secure continuous carriage, and uniform rates, and to compel the furnishing of equal "facilities. We cannot see that the entry of judgment in this case interferes in any way with the "legitimate exercise of interstate commerce."

A writ of error was taken to this court from the judgment of affirmance thus entered by the Supreme Court of Pennsylvania.

SPECIFICATIONS OF ERROR RELIED UPON.

The specifications of error are to be found on page 68 of the Record. They allege error in the Supreme Court of the State of Pennsylvania in entering its judgment af-

firming that entered by the Court of Common Pleas, No. 2, of Philadelphia County, because the law enforced by said judgment is a regulation of commerce and is violative of the Interstate Commerce Act of 1887, inasmuch as it made effectual an alleged public policy of the State of Pennsylvania which declared illegal a contract for interstate commerce transportation where the shipper, in consideration of a reduced rate, agreed, in case of the carrier's negligence, that a stipulated valuation alone should be recovered. All the assignments of error are therefore relied upon because all are directed to said points.

BRIEF OF ARGUMENT.

One of the connecting carriers under a bill of lading which provided for an interstate through transportation, made in the State of New York where the decisions sustained its validity, has been made responsible to the extent of $9000 for negligence in transporting a horse, although a reduced rate of freight had been charged in consideration of the agreement that in case of loss no greater valuation than $100 could be recovered.

An interstate commerce contract, valid in New York, where it was made, and valid, as this court has repeatedly decided, everywhere in the United States, has been set aside by the courts of Pennsylvania because held by them as illegal and violative of the public policy of that State.

In the statement of the case we have given citations from the charge of the trial judge and from the opinion of the learned justice who spoke for the Supreme Court of Pennsylvania, putting the refusal to enforce this contract upon a supposed public policy of Pennsylvania.

The inevitable result of this decision will be to compel the shipper, in the future, to pay a higher rate of freight when horses are transported. No carrier will transport them at a reduced rate if deprived of all consideration for such reduced rate.

I. THE COMMON LAW OF THE UNITED STATES AS INTERPRETED BY THIS COURT, PERMITS CARRIERS, IN THE COURSE OF INTERSTATE COMMERCE, IN CONSIDERATION OF MAKING A REDUCED RATE, TO LIMIT THEIR LIABILITY TO A DESIGNATED VALUATION.

II. A CONTRACT FOR AN INTERSTATE TRANSPORTATION, ESPECIALLY ONE VALID WHERE MADE, IS NOT SUBJECT TO INCONSISTENT PUBLIC POLICIES NOR TO ANY OTHER PUBLIC POLICY THAN THAT OF THE UNITED STATES.

III. A STATE LAW OR STATE POLICY WHICH INTERFERES WITH OR REGULATES INTERSTATE COMMERCE IS VOID BECAUSE IT IS EXCLUSIVELY WITHIN THE POWER OF CONGRESS TO REGULATE SUCH COMMERCE AND SUCH POWER HAS BEEN EXERCISED BY THE INTERSTATE COMMERCE ACT OF 1887.

IV. THE FEDERAL QUESTION INVOLVED IN THIS APPEAL IS PROPERLY RAISED UPON THE RECORD.

I. The common law of the United States as interterpreted by this court, permits carriers, in the course of interstate commerce, in consideration of making a reduced rate, to limit their liability to a designated valuation.

It is hardly necessary to establish this proposition by a citation to this court of its own decisions, some of which are very recent in date.

In Hart *vs.* P. R. R. Co., 112 U. S., 331, it was said by Mr. Justice Blatchford, in delivering the opinion of this court (page 336):—

> "It is contended for the plaintiff that the bill of "lading does not purport to limit the liability of the "defendant to the amounts stated in it, in the event "of loss through the negligence of the defendant. "But we are of opinion that the contract is not "susceptible of that construction. The defendant "receives the property for transportation, on the

"terms and conditions expressed, which the plaintiff "accepts as just and reasonable. The first paragraph "of the contract is that the plaintiff is to pay the rate "of freight expressed, 'on the condition that the car-"'rier assumes a liability on the stock to the extent of "'the following agreed valuation. If horses or mules, "'not exceeding $200 each. * * * If a chartered "'car, on the stock and contents in same, $1200 for "'the carload.' Then follow in the first paragraph "these words: 'But no carrier shall be liable for the "'acts of the animals themselves, or to each other, "'such as biting, kicking, goring, or smothering, nor "'for loss or damage arising from condition of the "'animals themselves, which risks, being beyond the "'control of the company, are hereby assumed by the "'owner, and the carrier released therefrom.' This "statement of the fact that the risk from the acts and "condition of the horses are risks beyond the control "of the defendant, and are, therefore, assumed by "the plaintiff, shows, if more were needed than the "other language of the contract, that the risks and "liability assumed by the defendant in the remainder "of the same paragraph are those not beyond, but "within, the control of the defendant, and, therefore, "apply to loss through the negligence of the de-"fendant.

"It must be presumed from the terms of the bill "of lading, and without any evidence on the subject "and especially in the absence of any evidence to "the contrary, that as the rate of freight expressed "is stated to be on the condition that the defendant "assumes a liability to the extent of the agreed "valuation named, the rate of freight is graduated "by the valuation. Especially is this so, as the "bill of lading is what its heading states it to be, 'a "'limited liability live-stock contract,' and is con-"fined to live stock. Although the horses, being "race horses, may, aside from the bill of lading, "have been of greater real value than that specified "in it, whatever passed between the parties before "the bill of lading was signed was merged in the "valuation it fixed; and it is not asserted that the "plaintiff named any value, greater or less, other-

"wise than as he assented to the value named in "the bill of lading, by signing it. The presumption "is conclusive that if the liability had been assumed "on a valuation as great as that now alleged, a "higher rate of freight would have been charged. "The rate of freight is indissolubly bound up with "the valuation. If the rate of freight named was "the only one offered by the defendant, it was be- "cause it was a rate measured by the valuation "expressed. If the valuation was fixed at that "expressed, when the real value was larger, it was "because the rate of freight named was measured "by the low valuation. The plaintiff cannot claim "a higher valuation on the agreed rate of freight.

"It is further contended by the plaintiff that the "defendant was forbidden, by public policy, to fix "a limit for its liability for a loss by negligence at "an amount less than the actual loss by such neg- "ligence. As a minor proposition, a distinction is "sought to be drawn between a case where a shipper, "on requirement, states the value of the prop- "erty and a rate of freight is fixed accordingly, "and the present case. It is said that while in the "former case the shipper may be confined to the "value he so fixed, in the event of a loss by negligence, "the same rule does not apply to a case where the "valuation inserted in the contract is not a valuation "previously named by the shipper. But we see no "sound reason for this distinction. The valuation "named was the 'agreed valuation,' the one on "which the minds of the parties met, however it "came to be fixed, and the rate of freight was based "on that valuation, and was fixed on condition that "such was the valuation, and that the liability "should go to that extent, and no further.

"We are therefore, brought back to the main "question. It is the law of this court that a com- "mon carrier may, by special contract, limit his "common-law liability; but that he cannot stipulate "for exemption from the consequences of his own "negligence or that of his servants. New Jersey "Steam Nav. Co. *vs.* Merchants' Bank, 6 How., "344; York Co. *vs.* Central R. R. Co., 3 Wall., 107;

"Railroad Co. *vs.* Lockwood, 17 Wall., 357; Express "Co. *vs.* Caldwell, 21 Wall., 264; Railroad Co. *vs.* "Pratt, 22 Wall., 123; Bank of Kentucky *vs.* Adams "Express Co., 93 U. S., 174; Railway Co. *vs.* Stevens, "95 U. S., 655.

"In York Co. *vs.* Central Railroad, 3 Wall., 107, "a contract was upheld exempting a carrier from "liability for loss by fire, the fire not having occurred "through any want of due care on his part. The "court said that a common carrier may 'prescribe "'regulations to protect himself against imposition "'and fraud, and fix a rate of charges proportionate "'to the magnitude of the risks he may have to "'encounter.'

"In Railroad Co. *vs.* Lockwood, 17 Wall., 357, the "following propositions were laid down by this "court: (1) A common carrier cannot lawfully "stipulate for exemption from responsibility when "such exemption is not just and reasonable in the "eye of the law; (2) it is not just and reasonable, "in the eye of the law, for a common carrier to "stipulate for exemption from responsibility for the "negligence of himself or his servants; (3) these rules "apply both to carriers of goods and to carriers of "passengers for hire, and with special force to the "latter. The basis of the decision was that the "exemption was to have applied to it the test of its "justness and reasonable character. It was said "that the contracts of the carrier 'must rest upon "'their fairness and reasonableness,' and that it "was just and reasonable that carriers should not be "responsible for losses happening by sheer accident, or "chargeable for valuable articles liable to be dam-"aged, unless apprised of their character or value. "That case was one of a drover traveling on a stock "train on a railroad, to look after his cattle, and "having a free pass for that purpose, who had signed "an agreement taking all risk of injury to his cattle "and of personal injury to himself, and who was "injured by the negligence of the railroad company "or its servants.

"In Express Co. *vs.* Caldwell, 21 Wall., 264, this "court held, that an agreement made by an express

"company, a common carrier in the habit of carry-
"ing small packages, that it should not be held
"liable for any loss or damage to a package delivered
"to it, unless claim should be made therefor within
"ninety days from its delivery to the company, was
"an agreement which the company could rightfully
"make. The court said: 'It is now the settled
"'law, that the responsibility of a common carrier
"'may be limited by an express agreement made
"'with his employer at the time of his accepting
"'goods for transportation, provided the limitation
"'be such as the law can recognize as reasonable and
"'not inconsistent with sound public policy.' It
"was held that the stipulation as to the time of
"making a claim was reasonable and intrinsically
"just, and could not be regarded as a stipulation for
"exemption from responsibility for negligence, be-
"cause it did not relieve the carrier from any obli-
"gation to exercise diligence, fidelity, and care.

"On the other hand, in Bank of Kentucky *vs.*
"Adams Express Co., 93 U. S., 174, it was held that
"a stipulation by an express company that it should
"not be liable for loss by fire could not be reason-
"ably construed as exempting it from liability for
"loss by fire occurring through the negligence of a
"railroad company which it had employed as a
"carrier.

"To the views announced in these cases we adhere.
"But there is not in them any adjudication on the
"particular question now before us. It may, how-
"ever, be disposed of on principles which are well
"established, and which do not conflict with any
"of the rulings of this court. As a general rule,
"and in the absence of fraud or imposition, a com-
"mon carrier is answerable for the loss of a pack-
"age of goods though he is ignorant of its contents,
"and though its contents are ever so valuable, if
"he does not make a special acceptance. This is
"reasonable, because he can always guard himself
"by a special acceptance, or by insisting on being
"informed of the nature and value of the articles
"before receiving them. If the shipper is guilty of
"fraud or imposition, by misrepresenting the nature

"or value of the articles, he destroys his claim to "indemnity, because he has attempted to deprive "the carrier of the right to be compensated in pro- "portion to the value of the articles and the conse- "quent risk assumed, and what he has done has "tended to lessen the vigilance the carrier would "otherwise have bestowed. 2 Kent's Comm., 603, "and cases cited; Relf *vs.* Rapp, 3 Watts and Ser- "geant, 21; Dunlap *vs.* International Steamboat Co., "98 Mass., 371; Railroad *vs.* Fraloff, 100 U. S., 24. "This qualification of the liabilty of the carrier is "reasonable, and is as important as the rule which "it qualifies. There is no justice in allowing the "shipper to be paid a large value for an article which "he had induced the carrier to take at a low rate of "freight on the assertion and agreement that its "value is a less sum than that claimed after a loss. "It is just to hold the shipper to his agreement, "fairly made, as to value, even where the loss or "injury has occurred through the negligence of the "carrier. The effect of the agreement is to cheapen "the freight and secure the carriage, if there is no "loss; and the effect of disregarding the agreement, "after a loss, is to expose the carrier to a greater "risk than the parties intended he should assume. "The agreement as to value, in this case, stands as "if the carrier had asked the value of the horses, "and had been told by the plaintiff the sum inserted "in the contract.

"The limitation as to value has no tendency to "exempt from liability for negligence. It does not "induce want of care. It exacts from the carrier "the measure of care due to the value agreed on. "The carrier is bound to respond in that value for "negligence. The compensation for carriage is based "on that value. The shipper is estopped from say- "ing that the value is greater. The articles have "no greater value, for the purposes of the contract "of transportation, between the parties to that con- "tract. The carrier must respond for negligence up "to that value. It is just and reasonable that such "a contract, fairly entered into, and where there is "no deceit practiced on the shipper, should be up-

"held. There is no violation of public policy. On "the contrary, it would be unjust and unreasonable, "and would be repugnant to the soundest principles "of fair dealing and of the freedom of contracting, "and thus in conflict with public policy, if a shipper "should be allowed to reap the benefit of the con- "tract if there is no loss, and to repudiate it in case "of loss.

"This principle is not a new one. In Gibbon *vs.* "Paynton, 4 Burrows, 2298, the sum of £100 was "hidden in some hay in an old mail bag and sent by "a coach and lost. The plaintiff knew of a notice "by the proprietor that he would not be answerable "for money unless he knew what it was, but did not "apprise the proprietor that there was money in the "bag. The defense was upheld, Lord MANSFIELD "saying: 'A common carrier, in respect of the "'premium he is to receive runs the risk of the goods, "'and must make good the loss, though it happen "'without any fault in him, the reward making him "'answerable for their safe delivery. His warranty "'and insurance is in respect of the reward he is to "'receive, and the reward ought to be proportionate "'to the risk. If he makes a greater warranty and "'insurance, he will take greater care, use more cau- "'tion, and be at the expense of more guards or "'other methods of security; and, therefore, he ought, "'in reason and justice, to have a greater reward.' "To the same effect is Batson *vs.* Donovan, 4 B. "& A, 21.

"The subject matter of the contract may be valued, "or the damages in case of a breach may be liqui- "dated in advance. In the present case the plaintiff "accepted the valuation as 'just and reasonable.' "The bill of lading did not contain a valuation of all "animals at a fixed sum for each, but a graduated "valuation according to the nature of the animal. "It does not appear that an unreasonable price would "have been charged for a higher valuation.

"The decisions in this country are at variance. "The rule which we regard as the proper one in the "case at bar is supported in Newburger *vs.* Howard, "6 Philadelphia Rep., 174; Squire *vs.* New York

"Central R. R. Co., 98 Mass., 239; Hopkins *vs.* West-
"cott, 6 Blatchford, 64; Belger *vs.* Dinsmore, 51
"N. Y., 166; Oppenheimer *vs.* United States Express
"Co., 69 Ill., 62; Magnin *vs.* Dinsmore, 56 N. Y.,
"168, and 62 *Id.*, 35, and 70 *Id.*, 410; Earnest *vs.*
"Express Co., 1 Woods, 573; Elkins *vs.* Empire
"Transportation Co., 81* Penn. St., 315; South &
"North Ala. R. R. Co. *vs.* Henlein, 52 Ala., 606;
"Same *vs.* Same, 56 *Id.*, 368; Muser *vs.* Holland,
"17 Blatchford, 412; Harvey *vs.* Terre Haute R. R.
"Co., 74 Missouri, 528; and Graves *vs.* Lake Shore
"Ry. Co., 137 Mass., 33. The contrary rule is sus-
"tained in Southern Express Co. *vs.* Moon, 39 Miss.,
"822; the City of Norwich, 4 Ben., 271; United States
"Express Co. *vs.* Backman, 28 Ohio St., 144; Black *vs.*
"Goodrich Transportation Co., 55 Wis., 319; Chicago,
"St. Louis & N. O. R. R. Co. *vs.* Abels, 60 Miss., 1017;
"Kansas City, &c., Railroad Co. *vs.* Simpson, 30
"Kansas, 645; and Moulton *vs.* St. Paul, &c., R. R.
"Co., 31 Minn., 85. We have given consideration
"to the views taken in these latter cases, but are
"unable to concur in their conclusions. Applying
"to the case in hand, the proper test to be applied
"to every limitation of the common-law liability
"of a carrier—its just and reasonable character—
"we have reached the result indicated. In Great
"Britain, a statute directs this test to be applied
"by the courts. The same rule is the proper one to
"be applied in this country, in the absence of any
"statutes.

"As relating to the question of the exemption of
"a carrier from liability beyond a declared value,
"reference may be made to section 4281 of the Re-
"vised Statutes of the United States (a re-enactment
"of section 69 of the Act of February 28, 1871, chapter
"100, 16 Stat., 458), which provides that if any
"shipper of certain enumerated articles, which are
"generally articles of large value in small bulk, 'shall
"'lade the same, as freight or baggage, on any vessel,
"'without at the time of such lading giving to the
"'master, clerk, agent, or owner of such vessel re-
"'ceiving the same a written notice of the true char-
"'acter and value thereof, and having the same en-

"'tered on the bill of lading therefor, the master and "'owner of such vessel shall not be liable as carriers "'thereof in any form or manner, nor shall any such "'master or owner be liable for any such goods beyond "'the value and according to the character thereof "'so notified and entered.' The principle of this "statute is in harmony with the decision at which we "have arrived.

"The plaintiff did not, in the course of the trial, "or by any request to instruct the jury, or by any "exception to the charge, raise the point that he "did not fully understand the terms of the bill of "lading, or that he was induced to sign it by any "fraud or under any misapprehension. On the con- "trary, he offered and read in evidence the bill of "lading as evidence of the contract on which he sued.

"The distinct ground of our decision in the case "at bar is, that where a contract of the kind, signed "by the shipper, is fairly made, agreeing on the val- "uation of the property carried, with the rate of "freight based on the condition that the carrier "assumes liability only to the extent of the agreed "valuation, even in case of loss or damage by the "negligence of the carrier, the contract will be up- "held as a proper and lawful mode of securing a due "proportion between the amount for which the car- "rier may be responsible and the freight he receives, "and of protecting himself against extravagant and "fanciful valuations. Squire *vs.* New York Central "R. R. Co., 98 Mass., 239, 245, and cases there cited."

The doctrine of this case is sustained by the later decisions of Phœnix Insurance Company *vs.* Erie & Western Transportation Company, 117 U. S., 312; Liverpool Steam Co. *vs.* Phœnix Insurance Company, 129 U. S., 397; New York, &c., R. R. Co. *vs.* Estill, 147 U. S., 591; Primrose *vs.* Western Union Telegraph, 154 U. S., 1; Chicago, Milwaukee, &c., Railway Company *vs.* Solan, 169 U. S., 133; Calderon *vs.* Atlas Steamship Company, 170 U. S., 272; and Queen of the Pacific, 180 U. S., 49.

In reaching its conclusion, this court interpreted the common law of the United States as the same exists in every State, including the State of Pennsylvania.

The common law which governs, is that stated by Mr. Justice Brewer in Western Union Tel. Co., *vs.* Call Pub. Co., 181 U. S., 101, in these words:—

> "Properly understood, no exceptions can be taken "to declarations of this kind. There is no body of "Federal common law separate and distinct from "the common law existing in the several States in the "sense that there is a body of statute law enacted by "Congress separate and distinct from the body of "statute law enacted by the several States. But it is "an entirely different thing to hold that there is no "common law in force generally throughout the "United States, and that the countless multitude of "interstate commercial transactions are subject to no "rules and burdened by no restrictions other than "those expressed in the statutes of Congress."

The same learned justice, in the course of his opinion, referring to a decision by District Justice Shiras, says (page 103):—

> "In it is collated a number of extracts from opin-"ions of this court, all tending to show the recogni-"tion of a general common law existing throughout "the United States, not, it is true, as a body of law "distinct from the common law enforced in the "States, but as containing the general rules and "principles by which all transactions are controlled, "except so far as those rules and principles are set "aside by express statute. It would serve no good "purpose to here repeat those quotations; it is enough "to refer to the opinion in which they are collated."

II. A contract for an interstate transportation, especially one valid where made, is not subject to inconsistent public policies nor to any other public policy than that of the United States.

The judgment of the Supreme Court of Pennsylvania is anomalous in that it establishes, as a legal principle, that a contract for interstate transportation, made by a carrier

of the State of New York, valid in the State where made, is illegal because of a public policy, supposed to exist in the State of Pennsylvania, although interstate commerce is within the exclusive jurisdiction of the Federal Government, and this court has determined that there is no such public policy.

If the judgment stands, therefore, a valid interstate commerce contract will be avoided because of a public policy which does not exist.

It would be difficult to maintain the proposition that an interstate commerce contract, valid where made, can be avoided by the courts of a State through which the commerce will pass or into which it will be delivered because of any public policy of such State, even though the public policy supposed to exist in Pennsylvania did exist, and even though the question of policy involved was not one concerning a transaction exclusively within the jurisdiction of the Federal Government.

In the Supreme Court of Pennsylvania the plaintiff in error argued, apart from the Federal question, that the contract was valid because valid in the place where made, because of its being performable partly within that State.

In that court, it thus argued:—

> "The only reason why the law of the place of contract does not always govern is, that different intention may be supposed to exist, where the entire performance is to be elsewhere; but, where no room is allowed for such inference, because of the performance being in several places, the law of the place must govern.
>
> "In the present case, the shipper presented himself to the New York Central Railroad Company's officials at Albany and demanded transportation of his horse, at a through rate, upon an entire contract, to a point near Philadelphia. The company had two rates for such transportation, one, the smaller, where a stipulated valuation was inserted in the bill of lading, and the other, the higher, where the horse was to be carried without any specification as to its value. The carrier was not

"bound to give the shipper the benefit of the reduced "rate, unless he agreed to such specification. He "preferred to become his own insurer and to take the "chance involved in the carriage at the reduced rate.

"For valuable consideration, he entered into a "bargain, valid where made, which governed the "entire shipment. Why should not this court en- "force his contract, thus made upon an adequate "consideration? How can he claim that the carrier "is liable beyond the stipulated valuation when he "received the consideration for his agreement that "it should not be thus liable? A common carrier in "Pennsylvania, which stipulates against its own "negligence where the shipment is between two "points in that Commonwealth, gives to the shipper "no consideration where it says it will do something "because of his permitting it to exempt itself from "its own negligence, inasmuch as the exemption is "invalid and cannot be enforced. In the case now "before the court, however, the carrier was permitted "at the place of contract, to guard against its own "negligence under the circumstances which then "existed. Consideration, therefore, resulted to the "shipper.

"The exact point involved in the present case "arose in Morgan *vs.* New Orleans M. & T. R. Co., "2 Woods, 244, also reported in 17 Federal Cases, "754. This case has been quoted approvingly by Mr. "Justice Gray, 129 U. S., 397, to which reference will "subsequently be made.

Mr. Justice Bradley, in the Morgan case, said:—

"I have no difficulty in saying that the convey- "ances and transfers to be made in pursuance of the "contract were to be made in conformity with the "laws of the States respectively in which the prop- "erty, when consisting of realty, or subject to local "law, was situated. And such conveyances and "transfers, when executed, would be governed by "the *lex rei sitae*. But that does not answer the "question as to what law the principal contract is "to be governed by. In Louisiana, non-perform-

"ance of a material stipulation renders the whole "contract liable to be dissolved. But no one would "apply that rule of Louisiana law to a contract not "subject to its dominion, even though the breach "should occur in Louisiana. The fact, therefore, that "one of the acts to be performed in this case—the "construction of the railroad—was to be performed "in Louisiana, will not help to resolve the question, "unless we can affirm that the entire contract is to "be governed by Louisiana law. Does the fact "that a portion of the contract must necessarily be "performed in Louisiana, subject it to that condition? "If that does, then the like fact that a portion of the "contract is necessarily to be performed in Alabama "would subject it to Alabama law, and make it an "Alabama contract. In this embarrassment I do "not know that I can do better than to fall back on "the general rule that a contract is to be governed "by the law of the place where it is made. The "presumption that where a contract is to be per-"formed in a different jurisdiction, the parties must "be intended to have in view the laws of the latter, "seems to be repelled when the performance is to "take place in several different jurisdictions. For "when there are two equal and opposite presump-"tions, neither of them can prevail. The present "case is still stronger, for much of the contract was "performable, and actually performed in the place "where it was made. I do not mean to say that "where the main and principal part of a contract is "to be performed in a State different from that in "which it is made, the presumption will not arise "that it is made in reference to the laws of such place "of performance, even though some minor and in-"cidental parts are required to be performed in still "different States. Such may very possibly be the "result in many instances that may occur. When "they happen they will be governed by the force of "their own circumstances. But I do not see that I "am called upon to apply any such exceptional rule "in this case. The building of the railroad in ques-"tion was a very important consideration, it is true; "but the contract embraced many other consider-

"ations equally important, that were not necessarily "to be performed in Louisiana.

"The conclusion, therefore, to which I am forced "to come is, that the principal contract, made on "the 12th of December, 1871, between the com- "plainant and the New Orleans, Mobile and Texas "Railroad Company, was a New York contract, "governed, as to its nature and obligation, by the "laws and jurisprudence of the State of New York; "and as by these laws and jurisprudence, so far as "appears, no such dissolving consequence follows "from a non-performance of part of the contract, "as is claimed in this case, the claim is untenable, "and the relief must be refused. As no relief can "be granted on either of the grounds laid in the bill "of complaint, the same must be dismissed with "costs."

In Liverpool Steam Co., *vs.* Phœnix Ins. Co., 129 U. S., 397, the syllabus reads:—

"A contract of affreightment, made in an American "port by an American shipper with an English "steamship company doing business there, for the "shipment of goods there and their carriage to and "delivery in England, where the freight is payable "in English currency, is an American contract, and "governed by American law, so far as regards the "effect of a stipulation exempting the company from "responsibility for the negligences of its servants "in the course of the voyage.

Mr. Justice Gray said (458):—

"This review of the principal cases demonstrates "that according to the great preponderance, if not "the uniform concurrence of authority, the general "rule, that the nature, the obligation and the inter- "pretation of a contract are to be governed by the "law of the place where it is made, unless the parties "at the time of making it have some other law in "view, requires a contract of affreightment made "in one country between citizens or residents thereof,

"and the performance of which begins there, to be "governed by the law of that country, unless the "parties, when entering into the contract, clearly "manifest a mutual intention that it shall be gov- "erned by the law of some other country.

"There does not appear to us to be anything in "either of the bills of lading in the present case, "tending to show that the contracting parties "looked to the law of England, or to any other law "than that of the place where the contract was "made."

He further said (459):—

"The contract being made at New York, the ship "owner having a place of business there, and the "shipper being an American, both parties must be "presumed to have submitted themselves to the law "there prevailing, and to have agreed to its action "upon their contract. The contract is a single one, "and its principal object, the transportation of the "goods, is one continuous act, to begin in the Port "of New York, to be chiefly performed on the high "seas, and to end at the Port of Liverpool. The "facts that the goods are to be delivered at Liver- "pool, and the freight and primage, therefore, pay- "able there in sterling currency, do not make the "contract an English contract, or refer to the Eng- "lish law the question of the liability of the carrier "for the negligence of the master and crew in the "course of the voyage. Peninsular & Oriental Co. "*vs.* Shand, Lloyd *vs.* Guibert, and Chartered Bank "of India *vs.* Netherlands Steam Navigation Co. "before cited."

He further stated (461):—

"Our conclusion on the principal question in the "case may be summed up thus: Each of the bills "of lading is an American and not an English con- "tract, and, so far as concerns the obligation to "carry the goods in safety, is to be governed by the "American law, and not by the law, municipal or

"maritime, of any other country. By our law, as "declared by this court, the stipulation by which "the appellant undertook to exempt itself from lia- "bility for the negligence of its servants is contrary "to public policy, and therefore void; and the loss "of the goods was a breach of the contract, for which "the shipper might maintain a suit against the car- "rier. This being so, the fact that the place where "the vessel went ashore, in consequence of the neg- "ligence of the master and officers in the prosecu- "tion of the voyage, was upon the coast of Great "Britain, is quite immaterial."

In the course of the decision there is a citation from Hale *vs.* New Jersey Steam Navigation Co., 15 Conn., 538, said case being thus reported by this court (455):—

"Goods were shipped at New York for Providence, "in Rhode Island, or Boston, in Massachusetts, on "a steamboat employed in the business of trans- "portation between New York and Providence; and "an exemption, claimed by the carrier under a pub- "lic notice, was disallowed by the Supreme Court "of Connecticut, because by the then law of New "York the liability of a common carrier could not "be limited by such a notice. Chief Justice Will- "iams, delivering judgment, said, 'The question is, "'by what law is this contract to be governed?' The "rule upon that subject is well settled, and has been "often recognized by this court, that contracts are "to be construed according to the laws of the State "where made, unless it is presumed from their tenor "that they were entered into with a view to the "laws of some other State. There is nothing in this "case, either from the location of the parties or the "nature of the contract, which shows that they could "have had any other law in view than that of the "place where it was made. Indeed, as the goods "were shipped to be transported to Boston or Prov- "idence, there would be the most entire uncertainty "what was to be the law of the case if any other "rule was to prevail. We have, therefore, no doubt "that the law of New York, as to the duties and

"obligations of common carriers, is to be the law of "the case."

The plaintiff in error's contention was not accepted as sound by the Supreme Court of Pennsylvania. In this court we urge additionally, that a contract for a transportation to be performed connectedly, in several States, valid in the place where made, and in accordance with the public policy which governs interstate transportation, is enforceable everywhere.

In the court below, the learned trial judge struck down the contract for a reason reiterated by the Supreme Court, thus expressed (Record, page 59):—

> "It is perfectly obvious that it [the State of Penn-"sylvania] will still less permit people outside of the "State to make contracts by which the sovereignty "of the State of Pennsylvania shall be interfered "with. * * * No man may go away from here "and agree to violate the public policy of Pennsyl-"vania and no man who has never been here may "outside of the State contract to violate the public "policy of Pennsylvania within the State. There-"fore so far as these papers constitute a contract "by anybody at any time or any place made and "entered into contemplating a violation of the public "policy of Pennsylvania upon its own highways, "such contract is absolutely null and void to that "effect."

We submit that it is entirely competent for any person to enter into a contract concerning interstate commerce, which is valid under the laws and public policy of the United States, and that the public policy of Pennsylvania, if any exists, and this court has held that none such does exist, must necessarily yield. It is not within the power of the Legislature, or of the courts of Pennsylvania, to stigmatize as illegal and to destroy a valid contract of interstate commerce. Whether such contract is or is not valid, is determinable by the laws of the United States, and all inconsistent laws of the States through which such commerce is conducted, are null.

In fact, there is no public policy such as was supposed to exist by the learned trial judge. This court, whose decision of the question is final, has so held.

We therefore present a case in which the courts of Pennsylvania have refused to enforce contracts exclusively within the jurisdiction of the Federal laws, and which, under such laws, are valid. If, therefore, a public policy in any State interferes with interstate commerce it must yield to the superior rights of those interested in the latter. Though such public policy may control commerce within the State, it is utterly inefficacious as regards commerce between the States.

The bill of lading in the present case was an entire contract stipulating for an entire transportation from one State to another, though performable at different points by different connecting carriers. It could not be held valid in one part and invalid in another, inasmuch as one consideration was paid for the whole service. The shipper received in New York, for the transportation through New York, a benefit which, under the laws of New York, resulted from the contract. This consideration sustained the contract in all its parts. An entire contract is not subject to several inconsistent public policies.

III. A State law or State policy which interferes with or regulates interstate commerce, is void because it is exclusively within the power of Congress to regulate such commerce and such power has been exercised by the Interstate Commerce Act of 1887.

It is hardly necessary to do more than state a proposition which will be universally accepted, viz., that the power in Congress to regulate interstate commerce is exclusive. No power exists in the States to regulate or interfere with the same. Until the power is exercised, interstate commerce is free from all restraints saving those imposed by the common law of the United States. Such common law is at all times subject to change by Congress. The Interstate Commerce Act of 1887 has introduced certain changes, and the rights and duties of interstate commerce are now

determined by the common law of the United States as modified by said enactment.

It is hardly necessary to sustain by argument the proposition that any law of the State which forbids the enforcement of a valid contract concerning interstate commerce interferes with and regulates such commerce.

The law of the United States leaves carriers and shippers free to make such contracts for interstate transportation as were made in the present case. By means of such a contract, the shipper is enabled to carry at a less rate of charge, and the carrier is exposed to less liability. It goes without saying that if the contract cannot be enforced by the carrier, it will not be made. The refusal to enforce is equivalent to a prohibition to make. The shipper will thus be deprived of an advantage which he might otherwise obtain. The unlimited right to contract is practically circumscribed.

It is immaterial in what form the State attempts thus to interfere, whether by an Act passed before the Interstate Commerce Act, or thereafter, or by its so-called common law, or by its so-called public policy. The interference with the contract comes from the law-making power of the State, and such interference is not within that power. If there is any public policy of Pennsylvania which condemns the contract, it cannot be one found in the common law of the United States. This court has so said. It must be the result of something peculiar to the law of Pennsylvania.

The purpose of the Interstate Commerce Act was to compel the exaction of reasonable rates; to bring about shipments connectedly and continuously from one State to another; to bring about by agreements between the carriers the establishment of joint rates; to compel the publication of such joint rates for through traffic; and to prohibit departures from the rates as published.

We will endeavor to illustrate this general statement by quotations from the Act of 1887. (24 Stats., U. S. 379.)

It provides that its provisions—

"Shall apply to any common carrier or carriers "engaged in the transportation of passengers or

"property wholly by railroad, or partly by railroad
"and partly by water when both are used, under a
"common control, management or arrangement
"for a continuous carriage or shipment from one
"State or Territory in the United States, &c., to
"any other State or Territory, &c."

It further provides (page 380):—

"Every common carrier subject to the provisions
"of this Act shall, according to their respective
"powers, afford all reasonable, proper and equal
"facilities for the interchange of traffic between
"their respective lines, and for the receiving, forward-
"ing and delivering of passengers and property to
"and from their several lines and those connecting
"therewith, and shall not discriminate in their rates
"and charges between such connecting lines."

The sixth section of the Act as amended in 1889 (25 Stats. U. S., 855), requires that every common carrier subject to its provisions—

"Shall print and keep open to public inspection
"schedules showing the rates and fares and charges
"for the transportation of passengers and property
"which any such common carrier has established
"and which are in force at the time upon its route.
"The schedules printed as aforesaid by any such
"common carrier shall plainly state the places upon
"its railroad between which property and passen-
"gers will be carried, and shall contain the classi-
"fication of freight in force, and shall also state sepa-
"rately the terminal charges and any rules or regu-
"lations which in anywise change, affect or determine
"any part or the aggregate of such aforesaid rates
"and fares and charges. Such schedules shall be
"plainly printed in large type and copies for the use
"of the public shall be posted in two public and
"conspicuous places," &c.

The Act as amended as above further provides (page 856):—

"And in cases where passengers and freight pass "over continuous lines or routes operated by more "than one common carrier, and the several common "carriers operating such lines or routes establish "joint tariffs of rates or fares or charges for such "continuous lines or routes, copies of such joint "tariffs shall also, in like manner, be filed with said "Commission. Such joint rates, fares and charges "on such continuous lines so filed as aforesaid shall be "made public by such common carriers when di- "rected by said Commission, in so far as may, in the "judgment of the Commission, be deemed practi- "cable; and said Commission shall from time to time "prescribe the measure of publicity which shall be "given to such rates, fares and charges, or to such "part of them as it may deem it practicable for such "common carrier to publish, and the places in which "they shall be published.

"No advance shall be made in joint rates, fares "and charges shown upon joint tariffs, except after "ten days' notice to the Commission, which shall "plainly state the changes proposed to be made in "the schedule then in force, and the time when the "increased rates, fares or charges will go into effect. "No reduction shall be made in joint rates, fares "and charges, except after three days' notice, to be "given to the Commission as is above provided in "the case of an advance of joint rates. The Com- "mission may make public such proposed advances, "or such reductions, in such manner as may, in its "judgment, be deemed practicable, and may pre- "scribe from time to time the measure of publicity "which common carriers shall give to advances or "reductions in joint tariffs.

"It shall be unlawful for any common carrier, "party to any joint tariff, to charge, demand, col- "lect or receive from any person or persons a greater "or less compensation for the transportation of per- "sons or property, or for any services in connection "therewith, between any points as to which a joint

"rate, fare or charge is named thereon, than is speci-
"fied in the schedule filed with the Commission in
"force at the time.

"The Commission may determine and prescribe
"the form in which the schedules required by this
"section to be kept open to public inspection shall
"be prepared and arranged, and may change the
"form from time to time as shall be found expedient.

"If any such common carrier shall neglect or re-
"fuse to file or publish its schedules or tariffs of
"rates, fares and charges as provided in this sec-
"tion, or any part of the same, such common car-
"rier shall, in addition to other penalties herein
"prescribed, be subject to a writ of *mandamus*, to
"be issued by any Circuit Court of the United States
"in the judicial district wherein the principal office
"of said common carrier is situated, or wherein such
"offense may be committed, and if such common
"carrier be a foreign corporation in the judicial cir-
"cuit wherein such common carrier accepts traffic
"and has an agent to perform such service, to com-
"pel compliance with the aforesaid provisions of this
"section; and such writ shall issue in the name of
"the people of the United States, at the relation of
"the Commissioners appointed under provisions of
"this Act; and the failure to comply with its re-
"quirements shall be punishable as and for a con-
"tempt; and the said Commissioners, as complain-
"ants, may also apply, in any such Circuit Court of
"the United States, for a writ of injunction against
"such common carrier, to restrain such common car-
"rier from receiving or transporting property among
"the several States and Territories of the United
"States, or between the United States and adjacent
"foreign countries, or between ports of transship-
"ment and of entry and the several States and ter-
"ritories of the United States, as mentioned in the
"first section of this Act, until such common carrier
"shall have complied with the aforesaid provisions
"of this section of this Act."

By the seventh section of said Act it is provided (24 Stats. U. S., 382):—

"That it shall be unlawful for any common carrier "subject to the provisions of this Act to enter into "any combination, contract or agreement, expressed "or implied, to prevent, by change of time schedule, "carriage in different cars, or by other means or "devices, the carriage of freights from being con- "tinuous from the place of shipment to the place "of destination; and no break of bulk, stoppage or "interruption made by such common carrier shall "prevent the carriage of freights from being and "being treated as one continuous carriage from the "place of shipment to the place of destination, un- "less such break, stoppage or interruption was made "in good faith for some necessary purpose, and with- "out any intent to avoid or unnecessarily interrupt "such continuous carriage or to evade any of the "provisions of this Act."

It will thus be seen, that under the regulations for interstate commerce which have been prescribed by Congress, it is the duty of each carrier, forming part of a line of interstate transportation, to afford all proper facilities for the interchange of traffic between the respective lines, for the receiving, forwarding and delivering the same to and from initial and terminal lines by means of a connecting line. Further, no common carrier forming part of a through line of interstate transportation can prevent a shipment being continuous. The connecting carrier is bound to receive freight which is delivered to it from an initial line destined to another State.

Under these circumstances, Congress has made it the right of any initial carrier to compel a connecting carrier to receive and forward, continuously, interstate commerce. The Act encourages carriers forming part of a through line to make joint rates. Such rates must be posted and published and must be maintained.

When, therefore, the shipper in the present case delivered his horse to the New York Central Railroad at Albany, he insisted upon what was his right, viz., that the initial carrier should receive it under a bill of lading providing for a through, interstate, continuous, transportation. The

initial carrier had the right, under the joint tariff established and published under the Act of Congress, to bind every carrier to do what was necessary to transport the horse, each receiving its share of the through rate.

Under the Interstate Commerce Act, the initial carrier is authorized to act for all connecting lines which have joined in establishing the published through rate freight rate, and to make a contract for transportation binding upon each of them, even though the liability of each will actually commence only with the delivery to it. In the present case, therefore, we have a contract in New York, legal under the laws thereof, by which the shipper agreed, with all the carriers concerned in the through transportation, that if they would name a reduced rate he would, in case of loss, demand only the valuation fixed as an equivalent of such reduction. Upon what principle of law or of honesty can the shipper be permitted to avail himself of the advantage which he thus acquired, by a contract with the carrier authorized to act for all, and be released from the consideration he agreed to allow?

The contract was not to transport over the Pennsylvania Railroad, but over the lines of various connecting carriers, one of which happened to be that company. Though part of the service contracted for was to be performed in New York, the other portion, part of a connected whole, was to be performed in Pennsylvania. The contract was valid according to the law of the place of contract and of performance, and was made in furtherance of the policy of an Act of Congress.

Interstate commerce, as regulated by the Act of 1887, is interfered with in many particulars by any prohibition imposed by a State upon valid contracts concerning the same. The rates as published for through transportation must be followed and if *reasonable* can be enforced. Reasonable exemptions and restrictions are part of a contract of through transportation, enforceable by each of the parties thereto.

The restriction upon the right to contract, imposed by the law of Pennsylvania, necessarily increases the cost of shipping, and is therefore a direct restraint upon com-

merce. The carriers forming a through line, a part of which is located in Pennsylvania, if not permitted to fix a reduced rate to shippers desirous of obtaining the same and willing to specify a valuation of the goods to be carried because thereof, will in all cases charge the higher rates.

If the shipper desires to secure cheap transportation, and is willing to take the risk of injury to his property beyond a certain valuation, he is at liberty, under the law of the United States, to bargain therefor. If prevented from such bargaining, his ability to transport his merchandise from one State to another is interfered with and, we submit, improperly.

No State could prescribe to a common carrier engaged in interstate transportation its rates for such transportation. It can compel neither the raising nor the lowering of the same. It necessarily raises the rate of interstate carriage if it deprives the carrier and shipper of the ability to make bargains upon terms mutually satisfactory, which bring about a reduction of the cost of transportation.

In Hall *vs.* DeCuir, 95 U. S., 485, after the Supreme Court of Louisiana had decided that an Act of the General Assembly of that State required those engaged in the transportation of passengers among the States to give all persons traveling within that State upon vessels employed in such business equal rights and privileges in all parts of the vessel without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel who excluded colored passengers on account of their color from the cabin set apart for the use of whites during the passage, the Supreme Court of the United States held that such Act, so far as it had such operation, was a regulation of interstate commerce and was to that extent unconstitutional and void.

Mr. Chief Justice Waite, in the course of the opinion, said (page 488):—

> "We think it may safely be said that State "legislation which seeks to impose a direct burden

"upon interstate commerce, or to interfere directly "with its freedom, does encroach upon the exclusive "power of Congress. The statute now under con- "sideration, in our opinion, occupies that position. "It does not act upon the business through the "local instruments to be employed after coming "within the State, but directly upon the business "as it comes into the State from without or goes "out from within. While it purports only to control "the carrier when engaged within the State, it must "necessarily influence his conduct to some extent "in the management of his business throughout his "entire voyage. His disposition of passengers taken "up and put down within the State, or taken up "within to be carried without, cannot but affect in "a greater or less degree those taken up without and "brought within, and sometimes those taken up and "put down without. A passenger in the cabin set "apart for the use of whites without the State must, "when the boat comes within, share the accom- "modations of that cabin with such colored persons "as may come on board afterwards, if the law is "enforced."

In Wabash, St. Louis & Pacific Railway *vs.* Illinois, 118 U. S., 557, 572, it was said, after quoting from Hall *vs.* DeCuir:—

"The applicability of this language to the case "now under consideration, of a continuous trans- "portation of goods from New York to Central "Illinois, or from the latter to New York, is obvious, "and it is not easy to see how any distinction can "be made. Whatever may be the instrumentalities "by which this transportation from the one point "to the other is affected, it is but one voyage, as "much so as that of the steamboat on the Mississippi "River. It is not the railroads themselves that are "regulated by this act of the Illinois Legislature so "much as the charge for transportation, and, in the "language just cited, if each one of the States "through whose territories these goods are trans- "ported can fix its own rules for prices, for modes

"of transit, for times and modes of delivery, and all "the other incidents of transportation to which the "word 'regulation' can be applied, it is readily seen "that the embarrassments upon interstate trans- "portation as an element of interstate commerce "might be too oppressive to be submitted to. 'It "'was,' in the language of the court cited above, "'to meet just such a case that the commerce "'clause of the Constitution was adopted.'

"It cannot be too strongly insisted upon that the "right of continuous transportation from one end of "the country to the other is essential in modern "times to that freedom of commerce from the "restraints which the State might choose to impose "upon it, that the commerce clause was intended to "secure. This clause, giving to Congress the power "to regulate commerce among the States and with "foreign nations, as this court has said before, was "among the most important of the subjects which "prompted the formation of the Constitution. Cook "*vs.* Pennsylvania, 97 U. S. 566, 574; Brown *vs.* "Maryland, 12 Wheat., 419, 446. And it would be "a very feeble and almost useless provision, but "poorly adapted to secure the entire freedom of "commerce among the States which was deemed "essential to a more perfect union by the framers of "the Constitution, if, at every stage of the trans- "portation of goods and chattels through the "country, the State within whose limits a part of "this transportation must be done could impose "regulations concerning the price, compensation or "taxation, or any other restrictive regulation inter- "fering with and seriously embarrassing this com- "merce.

"The argument on this subject can never be better "stated than it is by Chief Justice Marshall in Gib- "bons *vs.* Ogden, 9 Wheat., 1, 195–6. He there "demonstrates that commerce among the States, "like commerce with foreign nations, is neces- "sarily a commerce which crosses State lines and "extends into the States, and the power of Congress "to regulate it exists wherever that commerce is "found. Speaking of navigation as an element of

"commerce, which it is, only, as a means of trans-
"portation, now largely superseded by railroads, he
"says: 'The power of Congress, then, comprehends
"'navigation within the limits of every State in the
"'Union, so far as that navigation may be, in any
"'manner, "connected with commerce with foreign
"'"nations, or among the several States, or with
"'"the Indian tribes." It may, of consequence,
"'pass the jurisdictional line of New York and act
"'upon the very waters (the Hudson River) to which
"'the prohibition now under consideration applies.'
"So the same power may pass the line of the State
"of Illinois and act upon its restriction upon the
"right of transportation extending over several
"States, including that one.

"In the case of Telegraph Co. *vs.* Texas, 105 U. S.,
"460, 465, the court held that 'a telegraph company
"'occupies the same relation to commerce as a carrier
"'of messages that a railroad company does as a car-
"'rier of goods,' and that both companies are instru-
"ments of commerce, and their business is commerce
"itself. * * * In the case of Welton *vs.* Mis-
"souri, 91 U. S., 275, 280, it was said: 'It will not be
"'denied that that portion of commerce with foreign
"'countries and between the States which consists in
"'the transportation and exchange of commodities is
"'of national importance, and admits and requires
"'uniformity of regulation. The very object of in-
"'vesting this power in the general Government was
"'to insure this uniformity against discriminating
"'State legislation.' And in County of Mobile *vs.*
"Kimball, 102 U. S., 691, 702, the same idea is very
"clearly stated in the following language: 'Com-
"'merce with foreign countries and among the States,
"'strictly considered, consists in intercourse and
"'traffic, including in these terms navigation and
"'the transportation and transit of persons and prop-
"'erty, as well as the purchase, sale and exchange of
"'commodities. For the regulation of commerce, as
"'thus defined, there can be only one system of rules,
"'applicable alike to the whole country; and the au-
"'thority which can act for the whole country can
"'alone adopt such a system. Action upon it by

"'separate States is not, therefore, permissible. Lan-
"'guage affirming the exclusiveness of the grant of
"'power over commerce as thus defined may not be
"'inaccurate, when it would be so if applied to legis-
"'lation upon subjects which are merely auxiliary to
"'commerce.' * * * We must, therefore, hold
"that it is not, and never has been, the deliberate
"opinion of the majority of this court, that the
"statute of a State which attempts to regulate the
"fares and charges by railroad companies within its
"limits, for a transportation which constitutes a part
"of commerce among the States, is a valid law.

"Let us see precisely what is the degree of inter-
"ference with the transportation of property or per-
"sons from one State to another which this statute
"proposes. A citizen of New York has goods which
"he desires to have transported by the railroad com-
"panies from that city to the interior of the State of
"Illinois. A continuous line of rail over which a car
"loaded with these goods can be carried, and is car-
"ried habitually, connects the place of shipment with
"the place of delivery. He undertakes to make
"a contract with a person engaged in the carrying
"business at the end of this route from whence the
"goods are to start, and he is told by the carrier, 'I
"'am free to make a fair and reasonable contract for
"'this carriage to the line of the State of Illinois, but
"'when the car which carries these goods is to cross
"'the line of that State, pursuing at the same time
"'this continuous track, I am met by a law of Illinois
"'which forbids me to make a free contract concerning
"'this transportation within that State, and subjects
"'me to certain rules by which I am to be governed
"'as to the charges which the same railroad company
"'in Illinois may make or has made, with reference
"'to other persons and other places of delivery.' So
"that while that carrier might be willing to carry
"these goods from the city of New York to the city
"of Peoria at the rate of fifteen cents per hundred
"pounds, he is not permitted to do so because the
"Illinois railroad company has already charged at
"the rate of twenty-five cents per hundred pounds
"for carriage to Gilman, in Illinois, which is eighty-
"six miles shorter than the distance to Peoria.

"So also, in the present case, the owner of corn, "the principal product of the country, desiring to "transport it from Peoria, in Illinois, to New York, "finds a railroad company willing to do this at the "rate of fifteen cents per hundred pounds for a carload, "but is compelled to pay at the rate of twenty-five "cents per hundred pounds, because the railroad "company has received from a person residing at "Gilman twenty-five cents per hundred pounds for "the transportation of a carload of the same class of "freight over the same line of road from Gilman to "New York. This is the result of the statute of "Illinois, in its endeavor to prevent unjust discrim- "ination, as construed by the Supreme Court of that "State. The effect of it is, that whatever may be "the rate of transportation per mile charged by the "railroad company from Gilman to Sheldon, a dis- "tance of twenty-three miles, in which the loading "and unloading of the freight is the largest expense "incurred by the railroad company, the same rate "per mile must be charged from Peoria to the city "of New York.

"The obvious injustice of such a rule as this, which "railroad companies are by heavy penalties com- "pelled to conform to, in regard to commerce among "the States, when applied to transportation which "includes Illinois in a long line of carriage through "several States, shows the value of the constitu- "tional provision which confides the power of regu- "lating interstate commerce to the Congress of the "United States, whose enlarged view of the interests "of all the States, and of the railroads concerned, "better fits it to establish just and equitable rules.

"Of the justice or propriety of the principle which "lies at the foundation of the Illinois statute, it is "not the province of this court to speak. As re- "stricted to a transportation which begins and ends "within the limits of the State, it may be very just "and equitable, and it certainly is the province of "the State legislature to determine that question. "But when it is attempted to apply to transporta- "tion through an entire series of States a principle "of this kind, and each one of the States shall at-

"tempt to establish its own rates of transportation, "its own methods to prevent discrimination in rates, "or to permit it, the deleterious influence upon the "freedom of commerce among the States and upon "the transit of goods through those States cannot "be overestimated. That this species of regulation "is one which must be, if established at all, of a "general and national character, and cannot be safely "and wisely remitted to local rules and local regula- "tions, we think is clear from what has already "been said. And if it be a regulation of commerce, "as we think we have demonstrated it is, and as the "Illinois court concedes it to be, it must be of that "national character, and the regulation can only ap- "propriately exist by general rules and principles "which demand that it should be done by the Con- "gress of the United States under the commerce "clause of the Constitution."

The syllabus of C., C., C. & St. Louis Railway Company *vs.* Illinois, 177 U. S., 514 reads thus:—

"A State statute required all regular passenger "trains to stop a sufficient length of time at county "seats to receive and let off passengers with safety. "It appearing that the defendant company furnished "four regular passenger trains per day each way, "which were sufficient to accommodate all the local "and through business, and that all such trains "stopped at county seats, the Act was held to be "invalid as applied to an express train intended only "for through passengers from St. Louis to New "York.

"While railways are bound to provide primarily "and adequately for the accommodation of those "to whom they are directly tributary, they have "the legal right, after all these local conditions have "been met, to adopt special provisions for through "traffic, and legislative interference therewith is an "infringement upon the clause of the Constitution "which requires that commerce between the States "shall be free and unobstructed."

We have stated as a proposition which will not be disputed that a State statute, valid before an Act of Congress, must yield to the latter. In Kaukauna Co. *vs.* Green Bay, &c., Canal, 142 U. S., 254, it is held:—

> "Proceedings under a State statute enacted before the adoption of the fourteenth amendment which, if taken before its adoption, would not have violated the Constitution, may, when taken after its adoption, violate it, if prohibited by that amendment."

IV. The Federal question involved in this appeal is properly raised upon the record.

We argue this proposition, because of the contention made in the Supreme Court of Pennsylvania, by the defendant in error in these words:—

> "If the contention of the appellant is given its utmost weight by assuming that some of the provisions of the Interstate Commerce Act would be violated if this court should adhere to its previous decisions the appellant must nevertheless meet the difficulty that this suggested error is an afterthought. The point of law was not presented at the trial in the court below. Under such circumstances it is settled by abundant authority that this court will refuse to consider the assignment of error."

A point was presented, however, to the Court of Common Pleas, asking the judge to charge (Record, page 60):—

> "That the plaintiff is not entitled to recover in excess of $100."

The contract provided for a limited valuation of $100. The plaintiff contended it was invalid, because contrary to the law of Pennsylvania. The defendant maintained that

it was valid. If the law and public policy of Pennsylvania, alleged to exist, interfered with the Federal power to regulate commerce and violated the Act of 1887, passed in pursuance thereof, the defendant was entitled to enforcement of its contract. The point presented in the court below therefore raised the question of the validity of the contract. It could not have been held invalid if proper effect had been given to the paramount Federal law.

In the Supreme Court, the refusal of the points presented for charge to the trial judge was assigned as error (Record, page 62), and a further point was there presented in these words:—

> "III. The learned court below erred in entering "judgment in conflict with the Act of Congress of "February 4th, 1887, entitled 'An Act to regulate "'commerce.' Section 1 of said Act clearly pro- "vides that where the transportation is from one "State to another, under a through bill of lading, "its provisions shall be carried out, unless it be "in conflict with a statute of the State in which it "may be performed or in conflict with the policy "of the United States as laid down in the Federal "courts, and that, as the contract was valid in the "place where made, and, as there is no statute in "Pennsylvania prohibitory of an agreed valuation "to establish a rate, and, as it is consistent with "the policy of the United States as declared by the "Federal courts, the judgment should have been "for the valuation mentioned in the contract."

In dealing with the question of the applicability of the Federal power, Mr. Justice Potter, delivering the opinion of the Supreme Court of Pennsylvania, said (Record, page 66):—

> "The third assignment of error suggests that the "entry of judgment is in conflict with the Interstate "Commerce Act of Congress. This seems to be an "afterthought, as there is no indication in the record "that this question was raised or considered in the

"court below. It is not apparent how the Act can
"have any application to this case. It contains
"nothing bearing upon the validity of a contract
"limiting the liability of a railroad for loss or injury
"caused by negligence. The object of the Act seems
"to me to be to secure continuous carriage and uni-
"form rates, and to compel the furnishing of equal
"facilities. We cannot see that the entry of judg-
"ment in this case interferes in any way with the
"legitimate exercise of interstate commerce."

The Supreme Court of Pennsylvania did not refuse to consider the point because it had not been properly taken. On the contrary, it did consider it, and held that the Interstate Commerce Act had no application and did not prevent the enforcement of the supposed public policy, or law, of Pennsylvania.

Whilst we concede that if a point raising a Federal question is refused to be considered by the highest appellate court of the State, because of its finding that it was not properly raised in the lower court under its rules, this court may refuse to entertain an appeal, we submit that the present record discloses no refusal by the appellate tribunal to consider the Federal question for any such reason. On the contrary, the point was considered and was passed upon by the Supreme Court of Pennsylvania. It held that the Act of Congress did not interfere with the prohibition supposed to be imposed by the law of Pennsylvania, and that the limitation of liability to the specified valuation was illegal. It was impossible for it thus to hold if the Act of Congress and the Federal power over commerce governed the controversy.

It is probably a waste of time to refer this court to its own decisions upon the subject, but none the less we do so.

In Missouri, Kansas, &c., Ry. Co. *vs.* Elliott, 184 U. S., 533, it was said:—

"The proposition relied upon to secure the re-
"versal of the judgment below is that the State
"court erroneously allowed as an element of damage

"upon an injunction bond given in a court of the "United States the sum of alleged counsel fees for "procuring a dissolution of the injunction, and that "as such fees under the rule prevailing in the equity "courts of the United States are not properly allow-"able, therefore the State court denied an immunity "asserted in favor of the defendant below and aris-"ing from an authority exercised under the United "States.

"We are at the outset met by an objection that "there is no jurisdiction to review the judgment of "the Kansas City Court of Appeals. It is con-"tended on behalf of the defendant in error that "the Federal question relied upon was not raised "below, and therefore is not reviewable here.

"The general rule undoubtedly is, that those "Federal questions which are required to be specially "set up and claimed must be so distinctly asserted "below as to place it beyond question that the party "bringing the case here from the State court in-"tended to and did assert such a Federal right in "the State court. But it is equally true that even "although the allegations of Federal right made in "the State court were so general and ambiguous of "their character that they would not in and in "themselves necessitate the conclusion that a right "of a Federal nature was brought to the attention "of the State court, yet if the State court in deciding "the case has actually considered and determined a "Federal question, although arising on ambiguous "averments, then a Federal controversy having "been actually decided, the right of this court to "review obtains. Oxley Stave Co. *vs.* Butler, 166 "U. S., 648, 660. All that is essential is that the "Federal questions must be presented in the State "court in such a manner as to bring them to the "attention of that tribunal. Chicago &c. Ry. Co. "*vs.* Chicago, 166 U. S. 226. And of course, where "it is shown by the record that the State court con-"sidered and decided the Federal question, the "purpose of the statute is subserved. And so "controlling as to the existence of the Federal "question is the fact that it was actually considered

"and decided by the State court, that it has been
"held, although the general rule is that the raising
"of a Federal question in a petition for rehearing
"in the highest court of the State is too late, yet
"when a question is thus raised and it is actually
"considered and decided by the State court, the right
"to review exists. Mallett *vs.* North Carolina, 181
"U. S. 589, 592.

"Now, it plainly appears that the Kansas City Court
"of Appeals considered that there was presented
"to it for decision the question whether, in an action
"brought in a State court on an injunction bond
"given in a court of the United States, the State
"court was bound to apply to such a bond the rule
"prevailing in the courts of equity of the United
"States, viz., that attorneys' fees are not a proper
"element of damage. We say this is undoubted,
"since the opinion of the Kansas City Court of Ap-
"peals recites that such was the contention, and the
"court proceeded to consider and decide it. That
"this contention involved a claim of immunity
"under an authority exercised under the United
"States, reviewable in this court, we have recently
"decided in Tullock *vs.* Mulvane. True it is that the
"Kansas City Court of Appeals held, contrary to the
"rule announced in the Tullock case, that the State
"court was not bound to apply the rule of dam-
"ages prevailing in the courts of the United States,
"and in effect while so concluding decided that the
"claim that the bond should be enforced according to
"the rule prevailing in the courts of the United States,
"involved no Federal question. But the fact that
"the State court, whilst deciding the Federal ques-
"tion, erroneously held that it was not a Federal one,
"does not take the case out of the rule that where a
"Federal question has been decided below, jurisdic-
"tion exists to review. The result of the contrary
"doctrine would be this, that no case where the
"question of Federal right had been actually decided
"could be reviewed here if the State court, in passing
"upon the question, had also decided that it was
"non-Federal in its character. The assertion that
"a Federal right was not raised below is therefore
"without merit."

In Sully *vs.* American National Bank, 178 U. S., 298, it was said:—

> "In regard to the objection that even Carhart has "raised the question too late we think it is without "foundation. He raised it in the Supreme Court, "and that court decided it against him, not on the "ground that he had not raised it in the lower court, "but on its merits, and for the reason that in the "judgment of the Supreme Court the statute was a "valid and constitutional exercise of the legislative "powers of the State."

In Erie Railroad Co. *vs.* Purdy, 185 U. S., 153, it was said:—

> "So, if the highest court of the State, by its final "judgment, sustains the validity of a State enact- "ment drawn in question there as repugnant to the "Constitution, treaties or laws of the United States, "or denies a right, privilege or immunity specially "set up or claimed in that court for the first time "under the Constitution or any treaty, statute or "authority exercised under the United States, this "court could review that judgment, although no "Federal question was distinctly raised or insisted "upon in the trial court. * * *
>
> "We therefore cannot hold that the Court of Ap- "peals, by its final judgment, sustained the validity "under the Constitution of the United States of the "statute drawn in question by the defendant or that "it denied any right or immunity now claimed by it "under the Fourteenth Amendment; for that court "simply declined to consider any Federal question "except that made under the commerce clause of the "Federal Constitution, assigning as the reason there- "for that no point was made at the trial in respect of "any other clause of that instrument. In so holding, "the court followed the settled rule of practice in "that State. On that practice alone was based its "refusal to consider a Federal question not brought "to the attention of the trial court. Vose *vs.* Cock- "croft, 44 N. Y., 415; Delaney *vs.* Brett, 51 N. Y., 78.
>
> "Now, where a party—drawing in question in this

"court a State enactment as invalid under the Con-
"stitution of the United States, or asserting that the
"final judgment of the highest court of a State
"denied to him a right or immunity under the Con-
"stitution of the United States—did not raise such
"question or specially set up or claim such right or
"immunity in the trial court, this court cannot re-
"view such final judgment and hold that the State
"enactment was unconstitutional or that the right
"or immunity so claimed had been *denied* by the
"highest court of the State, if that court did nothing
"more than decline to pass upon the Federal ques-
"tion because not raised in the trial court as re-
"quired by the State practice. Spies *vs.* Illinois,
"123 U. S., 131, 181; Miller *vs.* Texas, 153 U. S., 535,
"538; Morrison *vs.* Watson, 154 U. S., 111, 115. Of
"course, if upon examining the record, this court had
"found a Federal question was properly raised, or
"that a Federal right or immunity was specially
"claimed, in the trial court, then our jurisdiction
"would not have been defeated by the mere failure of
"the highest court of the State to dispose of the
"question so raised or to pass upon the right or im-
"munity so claimed."

In Phila. Fire Association *vs.* New York, 119 U. S., 110, it was held:—

"A Pennsylvania fire insurance corporation began
"doing business in New York in 1872, and continued
"it afterwards till 1882, receiving from year to
"year certificates of authority from the proper offi-
"cer, under a statute of New York passed in 1853.
"Chapter 694 of the laws of New York, of 1865 as
"amended by c. 60 of the laws of 1875, provided
"that whenever the laws of any other State should
"require from a New York fire insurance company
"a greater license fee than the laws of New York
"should then require from the fire insurance com-
"panies of such other State, all such companies of
"such other State should pay in New York a license
"fee equal to that imposed by such other State on
"New York companies. In 1873, Pennsylvania

"passed a law requiring from every insurance com-
"pany of another State, as a prerequisite to a cer-
"tificate of authority, a yearly tax of 3 per cent. on
"the premiums received by it in Pennsylvania during
"the preceding year. In 1882, the insurance officer
"of New York required the Pennsylvania corpora-
"tion to pay, as a license fee, a tax of 3 per cent. on
"the premiums received by it in New York in 1881.
"In a suit against such corporation, in a court of
"New York, to recover such tax, it was set up as a
"defense, that the tax was unlawful, because the
"corporation was a 'person' within the 'jurisdiction'
"of New York, and the 'equal protection of the laws'
"had been denied to it, in violation of a clause in the
"Fourteenth Amendment to the Constitution of the
"United States. On a writ of error to review the
"judgment of the highest court of New York, over-
"ruling such defense: *Held*, that such clause had no
"application, because, the defendant, being a for-
"eign corporation, was not within the jurisdiction
"of New York, until admitted by the State on a
"compliance with the condition of admission im-
"posed, namely, the payment of the tax required as
"a license fee.

"The business carried on by the corporation in
"New York was not a transaction of commerce.

"The opinion of the highest court of New York,
"duly authenticated by the proper officer, and
"transmitted to this court, with the record, in
"compliance with the eighth Rule, was examined to
"aid in determining whether that court decided
"such Federal question against the defendant"

In the opinion of the court in this case, at page 115, it was said:—

"The defendant claims here the benefit of the
"Fourteenth Amendment, and a question has oc-
"curred as to whether the record presents that
"point for our review. There being no pleadings,
"the obvious place to look for the claim would be
"the agreed statement of facts. But all that is
"there said is, that the defendant insists that the

"statute is 'unconstitutional and void and not a "'legitimate exercise of legislative power.' The "question was considered, in both the Supreme "Court and the Court of Appeals, as to the validity "of the statute, under the Constitution of New "York, as being a law made to depend for its opera- "tion on the legislation of a foreign State, and thus "an illegitimate exercise of legislative power. This "contention is fairly within the words of the agreed "statement, and, if it depended wholly on that state- "ment to determine whether the record raises a "Federal question, some doubt might exist. But in "view of what was said in Murdock *vs.* Memphis, 20 "Wall., 590, 633, in Gross *vs.* United States Mortgage "Co., 108 U. S. 477, and in Adams County *vs.* Bur- "lington & Missouri Railroad Co., 112 U. S. 123, "we think that we are at liberty to look into the "opinion of the Court of Appeals, a copy of which, "duly authenticated by the proper officer, is trans- "mitted to us with the record, in compliance with our "eighth Rule, for the purpose of aiding in determin- "ing what was decided by that court. From that "opinion it appears that the court not only decided "against the defendant all the questions other than "Federal which were raised, including two under "the Constitution of New York, but also decided "against it the Federal question referred to. If "the court had decided in its favor any one of the "other questions which went to the whole cause of "action, there would have been no necessity for "considering the Federal question. But as it was, "the decision of that question became necessary to "the disposition of the case, and was fully con- "sidered, not *sua sponte*, but as a point presented "by the defendant.

"The provision of the Fourteenth Amendment, "which went into effect in July, 1868, is, that no "State shall 'deny to any person within its juris- "'diction the equal protection of the laws.' The "first question which arises is, whether this cor- "poration was a person within the jurisdiction of "the State of New York, with reference to the "subject of controversy and within the meaning of "the Amendment."

In Jacobi *vs.* Alabama, 187 U. S., 133, 136, it was said:—

"In Spies *vs.* Illinois, 123 U. S. 131, where objection "to the admission of a certain letter, because ob- "tained in violation of the Constitution of the United "States, was made in the Supreme Court of the "State for the first time, and that court declined to "consider the constitutional question supposed to "be involved on the ground that it was not raised "in the trial court, Mr. Chief Justice Waite said: "'To give us jurisdiction under section 709 of the "'Revised Statutes because of the denial by a State "'court of any title, right, privilege or immunity "'claimed under the Constitution, or any treaty or "'statute of the United States, it must appear on "'the record that such title, right, privilege or "'immunity was "specially set up or claimed" at "'the proper time in the proper way. To be re- "'viewable here the decision must be against the "'right so *set up or claimed*. As the Supreme Court "'of the State was reviewing the decision of the "'trial court, it must appear that the claim was "'made in that court, because the Supreme Court "'was only authorized to review the judgment for "'errors committed there, and we can do no more. "'This is not, as seems to be supposed by one of the "'counsel for the petitioners, a question of a waiver "'of a right under the Constitution, laws or treaties "'of the United States, but a question of claim. If "'the right was not set up or claimed in the proper "'court below, the judgment of the highest court "'of the State in the action is conclusive, so far as "'the right of review here is concerned.' And see "Brooks *vs.* Missouri, 124 U. S. 394; Baldwin *vs.* "Kansas, 129 U. S. 52."

In Home for Incurables *vs.* City of New York, 187 U. S., 155, 157, it was said:—

"The plaintiff insists here that the State court, "by its final judgment, refused to recognize cer- "tain rights belonging to it under the Constitution

"of the United States. But it does not appear on "the face of the record that he set up or claimed "any such right until the case reached this court. "In Parmelee *vs.* Lawrence, 11 Wall., 36, 38, this "court—following the previous cases of Lawley *vs.* "Walker, 14 How., 149, 152, and Railroad Com- "pany *vs.* Rock, 4 Wall., 177—said it was essential "to our jurisdiction in re-examining the judgment "of the State court that the alleged conflict between "the State law and the Constitution of the United "States 'appear in the pleadings of the suit, or from "'the evidence in the course of the trial, in the in- "'structions asked for, or from exceptions taken to "'the rulings of the court,' or 'it must be that such "'a question was necessarily involved in the decision, "'and that the State court would not have given "'a judgment without deciding it.' Later cases in "this court have expressed the additional thought "that if the highest court of the State assumes that "the record sufficiently presents a question of Fed- "eral right and decides against the party claiming "such right, we will look no further, and will proceed "to a consideration of that question, unless the de- "cision is made to rest, in part, upon some ground of "local law, sufficient enough in itself to sustain the "judgment, independently of any question of Fed- "eral right."

In Detroit, &c., Ry. *vs.* Osborn, 189 U. S., 383, 386, it was said:—

"A motion is made to dismiss the writ of error on "the ground that the record exhibits no Federal "question. The motion is denied. The plaintiff "claimed and set up a right under the Constitution "of the United States, and the decision of the Su- "preme Court of the State was tantamount to the "denial of that right. Kaukauna Co. *vs.* Green Bay "&c. Canal Co., 142 U. S., 254."

In Kaukauna Co. *vs.* Green Bay, &c., Canal Co., 142 U. S., 254, 269, it was said:—

"The only question involved in this case proper "for us to consider, is whether the act of legislature

"of Wisconsin of August 8th, 1848, reserving to the "State the water power created by the erection of "the dam over the Fox River, as construed by the "Supreme Court of the State, and the proceedings "thereunder, operated to deprive the plaintiffs in "error of their property without due process of law. "Notwithstanding the inhibition of the Constitution "is not distinctly put in issue by the pleadings, nor "directly passed upon in the opinion of the court, it "is evident that the court could not have reached a "conclusion adverse to the defendant company with-"out holding, either that none of its property had "been taken, or that it was not entitled to compen-"sation therefor, which is equivalent to saying that "it had not been deprived of its property without "due process of law. This court has had frequent "occasion to hold that it is not always necessary "that the Federal question should appear affirma-"tively on the record, or in the opinion, if an ad-"judication of such question were necessarily in-"volved in the disposition of the case by the State "court. Willson *vs.* Blackbird Creek Marsh Co., 2 "Pet., 245; Armstrong *vs.* Athens County, 16 Pet., "281; Chicago Life Insurance Co. *vs.* Needles, 113 "U. S., 574; Eureka Lake Co. *vs.* Yuba County, 116 "U. S., 410."

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